U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15Mar2002

In the Matter of:	:	
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RUSSELL DAUGHERTY,	:	Case Number: 2000-BLA-926
Claimant,	:	
	:	
v.	:	
	:	
ISLAND CREEK COAL COMPANY,	:	
Respondent,	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Joseph E. Wolfe, Esquire
For the Claimant

Douglas A. Smoot, Esquire
For the Respondent

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a request for modification of the denial of a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §§ 901 et seq. ("the Act"), and the regulations

promulgated thereunder.[1, 2] Since this claim was filed after March 31, 1980, Part 718 applies. §718.2 Because the Claimant Miner was last employed in the coal industry in Virginia, the law of the United States Court of Appeals for the Fourth Circuit controls (D-1, 2, 3). *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Procedural History

Claimant, Russell Daugherty, filed his initial claim for benefits under the Act on December 12, 1986 (D-56-1). The District Director denied the claim on June 17, 1987, and the case was referred to the Office of Administrative Law Judges where it was heard by Administrative Law Judge John S. Patton on June 22, 1988 (D-56-48). On December 15, 1988, Judge Patton issued a decision and order granting benefits (D-56-50). Employer, Island Creek Coal Company, appealed to the Benefits Review Board (the "Board") which vacated Judge Patton's award of benefits and remanded the case with instructions for re-evaluation of the medical evidence. *Daugherty v. Island Creek Coal Co.*, BRB No. 89-0115 BLA (May 16, 1991) (unpublished); (D-56-51, 56-63). Judge Patton was no longer available to consider the remand, and the case was reassigned to Administrative Law Judge Eric Feirtag, who issued a decision and order on remand denying benefits on July 22, 1992. (D-56-71). Judge Feirtag found that the Claimant had established the existence of pneumoconiosis by application of the "true doubt" rule to resolve what Judge Feirtag found to be conflicting, but equally probative , x-ray interpretations in the Claimant's favor. Judge Feirtag further found that the Claimant established a causal relationship between pneumoconiosis and his coal mine employment by invocation of the presumption under §718.203(b),[3] but that the Claimant had not established the existence of total disability. The Claimant took no further action regarding that application, and the initial claim was finally denied and administratively closed (D-58).

The Claimant filed a subsequent or duplicate claim for benefits on July 5, 1995 (D-1). On November 7, 1995, the District Director issued a notice of initial finding that the Claimant became totally disabled due to pneumoconiosis on July 1, 1995, and was, therefore, entitled to benefits (D-17). Employer

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[1]All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Claimant's Exhibits are denoted "C-"; Director's Exhibits, "D-"; Employer's Exhibits, "E-"; and citations to the hearing transcript are denoted "Tr."

[2]Pursuant to the order of this tribunal dated February 15, 2001, which was issued pursuant to the Preliminary Injunction Order dated February 9, 2001, in *Nat'l Mining Ass'n v. Chao,* No. 00-CV03086 (D.D.C., Feb. 9, 2001), all parties briefed the issues of whether the amendments of the regulatory provisions at §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205(c)(5), and 718.205(d) would affect the outcome of this claim. Since the injunction was lifted as of August 9, 2001, the issues subject to the briefing order are moot, and the amendments to Part 718, published in Fed. Regis. Vol. 65, No. 245, Wednesday, Dec. 20, 2000, which became effective on January 19, 2001, are applicable in accordance with their terms in this case, which was pending on the effective date of the amended regulations.

[3] Section 718.203(b) creates a rebuttable presumption in the case of a miner with ten or more years of coal mine employment that the miner's pneumoconiosis arose out of such employment.

contested the Claimant's eligibility and its liability, and submitted medical evidence in support of its position (D-18, 23, 24). The District Director then obtained a consultative opinion from a physician who reviewed the medical evidence and concluded that the Claimant did not have pneumoconiosis or a totally disabling respiratory impairment (D-25). After reviewing this additional evidence, the District Director denied the subsequent claim on March 4, 1996, based on findings that the evidence did not establish the presence of pneumoconiosis , or that pneumoconiosis was caused at least in part by coal mine work, or the existence of a total disability due to pneumoconiosis (D-27, 28). By letter dated April 17, 1996, the Claimant disagreed with the decision and requested a formal hearing (D-35).

On July 23, 1996, the District Director conducted an informal conference with the parties, at which the evidence and issues were discussed , and certain stipulations were made. Following the informal conference, the District Director issued a proposed decision and order on August 7, 1996, recommending that the subsequent claim be dismissed because the evidence did not establish that the Claimant was totally disabled due to pneumoconiosis or that there had been a material change in conditions under §725.309(d) (pre-amended). The proposed decision and order notified the Claimant that it would become final after thirty days unless he appealed by requesting a formal hearing before an Administrative Law Judge. (D-43). Claimant did not timely appeal, but he submitted new medical evidence and requested modification by letter dated July 10, 1997 (D-46,47). On September 16, 1997, the District Director issued a proposed decision and order denying Claimant's request for modification (D-50). The Claimant made a timely request for a formal hearing, and the District Director referred the case to the Office of Administrative Law Judges.

A hearing was scheduled before Administrative Law Judge Daniel F. Sutton on April 1, 1999. (D-77). On March 29, 1999, the Claimant submitted a request that the case be decided without a hearing on the basis of the documentary record (D-74). Employer appeared at the hearing on April 1, 1999, and stated that it had no objection to Claimant's request (D-77). On August 25, 1999, Judge Sutton issued a decision and order denying Claimant's request for modification of the denial of his subsequent claim. Judge Sutton found that Claimant had established by evidence of reasoned medical opinions the element of total disability, and, therefore, established a material change of conditions under §725.309(d). However, upon review of the entire evidentiary record, Judge Sutton found that the Claimant was not entitled to benefits because he failed to establish that his total disability was due to pneumoconiosis. (D-82). Claimant did not timely appeal Judge Sutton's decision and order, but, on March 27, 2000, Claimant submitted additional medical evidence along with a request for modification of Judge Sutton's denial of modification of his subsequent claim (D-83).

On May 17, 2000, the District Director issued a proposed decision and order denying Claimant's request for modification (D-90). Claimant requested a formal hearing on May 26, 2000, and this claim was referred to the Office of Administrative Law Judges on July 14, 2000 (D-94, 95). A hearing was held in Abingdon, Virginia on December 19, 2000, at which all parties were afforded a full opportunity to present evidence and argument. At the hearing, Director's Exhibits one (1) through ninety-five (95), Employer's Exhibits one (1) through fourteen (14), and Claimant's Exhibits one (1) through four (4) were admitted into the evidentiary record. (Tr. 8, 16, 42). This tribunal's findings and conclusions which follow are based

upon an analysis of the entire record, reviewed *de novo*, together with applicable statutes, regulations, and case law, in relation to those issues which remain in substantial dispute.

Issues

1. Whether the Claimant has proved the existence of a mistake in a determination of fact, or a change of conditions since July 22, 1992?
2. Whether the Claimant's total disability is due to pneumoconiosis?

Findings of Fact, Conclusions of Law, and Discussion

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. For the purpose of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201. In order to obtain federal black lung benefits, a claimant must prove by a preponderance of the evidence that: "(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause to his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529, 21 BLR 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 BLR 2-304 (4th Cir. 1995); 20 CFR §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

Background and Coal Mine Employment

Claimant was born on July 7, 1946, and completed three years of formal education (D-1; Tr. 12). Claimant has one dependent for purposes of augmentation of benefits under the Act: his wife, Beatrice, whom he married on April 14, 1976 (D-1, 4, Tr. 35). In the initial claim, Judge Patton found that Social Security records document that Claimant completed approximately ten years of coal mine employment (D-2, 56-50). At the informal conference held while Claimant's subsequent claim was pending, the District Director found that the Social Security Records established at least 10.15 years of coal mine employment. Accordingly, the District Director found and all parties stipulated to at least ten years of coal mine employment, ending on December 12, 1983. (D-43). In the current claim, Employer and Claimant stipulated to at least ten years of coal mine employment, although Claimant alleged fifteen to sixteen years at the hearing (D-94, Tr. 18). Based on review of the evidentiary record, this tribunal finds that the record supports the parties' stipulation to at least ten years of coal mine employment.

Claimant last worked for Employer in the coal mines in long wall jack setting (Tr. 21-27). Claimant ceased working for Employer in September 1982 due to a back injury. Claimant returned to work for

Employer in December 1983, but left a short time later on December 12, 1983 and went on disability. (D-1, 43, 56-48 at 16-17, 21-22). Claimant is a nonsmoker and has never smoked in the past (Tr. 20).

Modification: Change in Conditions or Mistake in a Determination of Fact

Claimant's request for modification is governed by§725.310, which provides that any party may request modification of an award or denial of benefits if such request is filed within one year of the denial alleging a change in conditions or mistake in a determination of fact. Where mistake of fact forms the grounds for the modification request, new evidence is not a prerequisite, and a mistake of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on evidence initially submitted. *Kovac v. BCNR Mining Corporation*, 16 BLR 1071 (1992), *modifying* 14 BLR 1-156 (1990). If no specific mistake is alleged, but the ultimate determination of entitlement is challenged, the entire record must be examined for a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge, as trier-of-fact, has the authority, and the duty, to review the record evidence *de novo* and is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence, in making a finding in regard to a mistake in a determination of fact in relation to a request for modification. *See Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see also Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see generally, O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

In determining whether a change in conditions has occurred, an Administrative Law Judge must "perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." *See Nataloni v. Director. OWCP*, 17 BLR 1-82, 1-84 (1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993).

This claim is a request for modification of a denial of a request for modification of a subsequent or duplicate claim. Under the pre-amended regulations, which apply to this case pursuant to §725.2(c), a subsequent claim shall be denied on the grounds of the prior denial unless the claimant demonstrates that there has been a material change in conditions. §725.309(d) (pre-amended). To prove a material change of conditions, a claimant must prove, under all of the favorable and unfavorable probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc)*. In his denial on August 25, 1999, of Claimant's request for modification of his subsequent claim, Judge Sutton found that, while Claimant had established a material change in conditions by proving by a preponderance of the evidence that he was totally disabled, Claimant did not prove that pneumoconiosis was a contributing cause of his totally disabling respiratory impairment (D-82). Therefore, the evidence submitted with the subsequent claim and first modification before Judge Sutton must be reviewed for a mistake in a

determination of fact, and, even if one is found, the newly submitted evidence must establish that the Claimant's totally disabling respiratory impairment is due to his pneumoconiosis.

Evidence Submitted Since Judge Sutton's Denial of the First Modification of the Duplicate Claim

X-ray Evidence[4]

Exhibit No.	X-ray Date	Reading Date	Physician/ Qualifications	Interpretation
D-83, 88	4/2/99	4/2/99	Humphrey R	0/0
D-83, 88	4/2/99	4/2/99	Robinette B	1/0; p/q
E-2	4/2/99	6/26/00	McSharry	0/0
E-3	4/2/99	9/22/00	Wiot B/R	0/0
E-4	4/2/99	9/30/00	Shipley B/R	0/0
E-5	4/2/99	10/18/00	Spitz B/R	0/0
E-9	4/2/99	11/6/00	Wheeler B/R	0/0
E-9	4/2/99	11/6/00	Scott B/R	0/0
E-11	4/2/99	11/16/00	Kim B/R	0/0
E-2	6/26/00	6/26/00	McSharry	0/0
E-3	6/26/00	9/22/00	Wiot B/R	0/0
E-4	6/26/00	9/30/00	Shipley B/R	0/0
E-5	6/26/00	10/18/00	Spitz B/R	0/0
E-9	6/26/00	11/6/00	Wheeler B/R	0/0
E-9	6/26/00	11/6/00	Scott B/R	0/0

[4] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "R". An interpretation of "0/0"signifies that the film was read completely negative for pneumoconiosis.

Exhibit No.	X-ray Date	Reading Date	Physician/ Qualifications	Interpretation
E-11	6/26/00	11/16/00	Kim B/R	0/0
C-2	11/14/00	11/10/00	Forehand	0/0

Pulmonary Function Studies [5]

Exh. No.	Date	Physician	Ht/ age	FEV_1	FVC	MVV	Valid	Qualify
D-83, 88	4/2/99	Robinette	73"/52	1.36 2.12	3.07 4.03		Yes	Yes Yes
E-2	6/26/00	McSharry	74"/53	1.48 2.32	2.85 4.03	40	Yes	Yes Yes
C-3	11/10/00	Forehand	74"/54	1.48 2.00	3.35 4.04	39 43	Yes	Yes Yes

On April 18, 2000, Dr. Richard F. Kucera, board-certified in internal medicine and the subspecialties of pulmonary diseases and critical care medicine, reviewed the April 2, 1999 spirometry and compared the results to pulmonary function studies performed by the Claimant in 1987, 1988 and 1995. Dr. Kucera found that the ventilatory studies performed on April 2, 1999 were unacceptable due to excessive variability. (D-88).

Arterial Blood Gas Studies[6]

Exhibit	Date	Physician	pO_2	pCO_2	Qualifying
D-83, 88	4/2/99	Robinette	71.0	36.3	No
E-2	6/26/00	McSharry	82.0	40.5	No

[5] The second set of listed values relates to post bronchodilator test results. Where there is a discrepancy among measurements of the Claimant's height, this tribunal is required to make a factual finding as to that height. *See Protoppas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This tribunal averages Claimant's reported heights to determine his height to be 73 2/3 inches.

[6] The second set of listed values relates to post-exercise test results.

Exhibit	Date	Physician	pO_2	pCO_2	Qualifying
C-4	11/10/00	Forehand	70.0 93.0	36.0 35.0	No No

Medical Opinion Evidence

Dr. Emory Robinette, board-certified in internal medicine and the subspecialty of pulmonary diseases and B-reader, examined the Claimant on April 2, 1999, but did not note a review of other past medical records. (D-83). Dr. Robinette recorded a coal mine employment history of sixteen years, last as a long wall and jack operator, a medical history, a family history, a history as a non-smoker, and current medications. The examination included a chest x-ray, pulmonary function and arterial blood gas testing, and an EKG. Dr. Robinette interpreted the x-ray as positive for pneumoconiosis, and stated that the pulmonary function studies demonstrated a significant severe obstructive ventilatory impairment with significant response to bronchodilators consistent with very severe obstructive lung disease, and suggestive of a reversible component. Lung volume studies were essentially normal. Dr. Robinette diagnosed coal workers' pneumoconiosis and very severe obstructive lung disease with response to bronchodilator therapy. He opined that Claimant would be unable to work as an underground coal miner, and that there was sufficient evidence to suggest that Claimant would benefit from continued medical therapy and inhaled corticosteroids and long-acting beta agonist. Dr. Robinette opined that Claimant's "condition appears to be chronic and irreversible and at least partially related to his coal mining employment."

The record contains Claimant's answers to Employer's interrogatories dated May 10, 2000, wherein Claimant listed Drs. J. Alemparte and J.P. Sutherland as treating physicians for his lungs and back (E-1).

Dr. Roger McSharry, board-certified in internal medicine and the subspecialties of pulmonary diseases and critical care medicine, examined the Claimant on June 26, 2000 and reviewed extensive medical evidence dating back to 1976 as summarized in an attachment to his report for his medical evaluation of the Claimant dated June 30, 2000. (E-2). Dr. McSharry recorded a fifteen year history of underground coal mine employment, last as a long wall jack setter, medical, social and family histories, and current medication. The examination included a chest-x-ray, EKG, and pulmonary function and arterial blood gas testing. Dr. McSharry interpreted the chest x-ray as negative for pneumoconiosis, noting that a B-reading was pending. The arterial blood gas test was normal with a borderline elevated carboxyhemoglobin level. Pulmonary function testing showed severe airflow obstruction with an "excellent" response to bronchodilator. Dr. McSharry noted that no diffusion abnormalities were seen.

Based upon his evaluation of the Claimant, Dr. McSharry opined that there was no evidence of coal workers' pneumoconiosis. Dr. McSharry explained that symptomatic coal workers' pneumoconiosis is almost always associated with typical radiographic abnormalities, which were not seen in the Claimant. He

stated that the pulmonary function testing showed severe abnormalities with marked reversibility compatible with moderate to severe chronic obstructive pulmonary disease. Dr. McSharry opined that the presence of some air trapping and normal diffusion suggested that chronic bronchitis and asthma accounted for the abnormalities seen. He noted that because no restrictive lung disease was present, coal workers' pneumoconiosis was less likely present. Dr. McSharry also explained that Claimant's normal resting arterial blood gas suggests that there are no significant abnormalities in lung parenchyma, which would be expected with coal workers' pneumoconiosis.

Dr. McSharry opined that coal related disease was not present, but that the Claimant had asthma and chronic bronchitis, which are not caused by coal dust exposure. He noted that industrial bronchitis can be caused by coal dust exposure, but that Claimant's lack of exposure to coal dust for eighteen years made it impossible for him to state that any of the Claimant's symptoms were related to that remote exposure history. He opined that the Claimant was totally disabled by his moderate to severe obstructive lung disease, which was due to asthma. Dr. McSharry found no reason to change his impression based on review of additional medical evidence, noting that spirometric studies have shown obstruction with response to bronchodilator, and elevated residual volume as well as normal partial pressure of oxygen on arterial blood gases suggested that asthma was the underlying disease as found by a number of physicians involved in the case. Dr. McSharry declared that, even if the Claimant were determined by x-ray to suffer from coal workers' pneumoconiosis, his opinion would remain unchanged.

Dr. McSharry reviewed Dr. Forehand's November 10, 2000 report for his supplemental report dated December 11, 2000. (E-13). Dr. McSharry disagreed with Dr. Forehand's assessment that coal dust exposure caused Claimant's respiratory impairment, noting that the temporal progression of Claimant's obstructive impairment that remained highly reversible was not supportive of a diagnosis of coal workers' pneumoconiosis, but was indicative of asthma. He explained that asthma frequently progresses over the years to the point where it becomes irreversible, the pattern observed in the Claimant, whose obstruction has exhibited decreasing degrees of reversibility over time. Dr. McSharry stated that Dr. Forehand's statement that FEV_1 in asthma is normal between attacks or in response to bronchodilators was incorrect, explaining that many patients, like the Claimant, continue to have persistent airflow abnormalities despite excellent response to bronchodilator. Dr. McSharry reiterated his previous opinions that Claimant was totally disabled by his significant airflow obstruction caused by asthma, that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis, and that Claimant would have had the same impairment had he never worked in the coal mine industry.

Dr. Abdul Dahhan, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed medical evidence consisting of his April 20, 1998 report based on his examination of the Claimant, his October 12, 1998 report based on review of specified medical records, the transcript from his November 1998 deposition for this case, Dr. Robinette's April 23, 1999 report based on examination, Dr. McSharry's June 30, 2000 report based on examination and record review, and various chest x-ray

interpretations of the April 2, 1999 and June 26, 2000 films.[7] (E-6). Based on his past examination of the Claimant and review of his medical records on previous occasions and for the current report, Dr. Dahhan stated that he continued to find insufficient objective data to justify the diagnosis of coal workers' pneumoconiosis. He based this finding on the variable obstructive abnormalities on clinical examination of the chest, obstructive abnormality on spirometry testing with significant response to bronchodilator therapy, despite the Claimant already being on multiple bronchodilators by oral and inhalation routes, normal lung volume and diffusion capacities, normal blood gas exchange mechanisms, and negative x-ray interpretations.

Dr. Dahhan opined that the Claimant had an airway obstruction that demonstrated significant response to bronchodilator therapy. He opined that, based on Claimant's post-bronchodilator pulmonary function study measurements, his arterial blood gas measurements, and clinical examination of the chest, from a respiratory standpoint, the Claimant retained the physiological capacity to return to his previous coal mining work or a job of comparable physical demand. Dr. Dahhan opined that Claimant's obstructive airway disease did not result from coal dust exposure or coal workers' pneumoconiosis, noting that Claimant's obstruction demonstrated significant response to bronchodilator therapy as noted by all examining physicians, a finding inconsistent with the permanent adverse affects of coal dust on the respiratory system. Dr. Dahhan also noted that Claimant's treating physician provided him with multiple bronchodilators, indicating that he believes Claimant is responsive to such therapy. Dr. Dahhan concluded that Claimant's pulmonary impairment was hyperactive airway disease, a condition of the general public at large and not caused by, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

Dr. Dahhan reviewed his past medical reports and the November 11, 2000 report of Dr. Forehand for his supplemental report dated December 8, 2000. (E-12). Dr. Dahhan continued to find insufficient objective data to justify the diagnosis of coal workers' pneumoconiosis as demonstrated by the variable wheeze on clinical examination of the chest, variable obstructive ventilatory impairment with response to bronchodilator therapy, normal diffusion capacity, adequate blood gas exchange and negative x-ray readings. Dr. Dahhan reiterated that Claimant's disabling obstructive ventilatory defect did not result from coal dust exposure or coal workers' pneumoconiosis, but was consistent with bronchial asthma as characterized by variable obstructive ventilatory defect with response to bronchodilator therapy in the face of air trappings with elevated residual volume, normal diffusion capacity and negative x-ray interpretations. Dr. Dahhan specifically disagreed with Dr. Forehand's statement that a patient with bronchial asthma demonstrates normal FEV_1 in response to bronchodilator therapy or has normal FEV_1, "especially for Claimant's age, since bronchial asthma causes remottling of the airway with development of chronic persistent obstructive ventilatory impairment." Dr. Dahhan reiterated that bronchial asthma is a condition of the general public at large and unrelated to or worsened or aggravated by the inhalation of coal dust or

[7] Page three of Dr. Dahhan's report appears to be either missing or misnumbered. However, Dr. Dahhan's opinion begins on page four, and therefore, is intact.

coal workers' pneumoconiosis.

Dr. John A. Michos, board-certified in internal medicine, reviewed medical records consisting of his May 6, 1998 deposition for this case, Dr. Fino's September 30, 1998 medical report, Dr. Robinette's April 23, 1999 medical report, Dr. McSharry's June 20, 2000 medical report, and x-ray interpretations of the April 2, 1999 and June 26, 2000 films for his report of November 2, 2000. (E-7). Dr. Michos opined that the Claimant did not have evidence of a respiratory impairment secondary to simple coal workers' pneumoconiosis. He based his opinion on the majority of B-readers who documented the absence of coal workers' pneumoconiosis on chest x-rays and pulmonary function study evidence which was consistent with the diagnosis of chronic asthma. Dr. Michos opined that the Claimant was totally disabled from performing his last coal mine employment based on "severe, poorly treated asthma which unfortunately will progress if not placed on adequate medications." He opined that it was unlikely that coal workers' pneumoconiosis played any role in the Claimant's respiratory disability, even if found in the future, based on normal DLCO's seen on past pulmonary function studies, no impairment in oxygen transfer with exercise, as documented on arterial blood gas studies, and, based on a significant improvement noted on pulmonary function studies with bronchodilators at a time when industrial bronchitis from coal mine employment would have been in remission.

Dr. Michos reviewed Dr. Forehand's November 10, 2000 report for his supplemental report of December 14, 2000 (E-14). Dr. Michos opined that the data was consistent with a diagnosis of asthma, and inconsistent with a diagnosis of coal workers' pneumoconiosis. He explained that if left untreated, asthma can lead to permanent disability with a progressive decline in lung function and decreased reversibility. Dr. Michos commented that Claimant was not on optimum treatment for his asthma and that accounted for his progressive and persistent subjective complaints. He opined that Claimant was totally and permanently disabled from returning to his last coal mine employment due to his poorly treated asthma. Dr. Michos stated that his opinion would not change if simple coal workers' pneumoconiosis were diagnosed.

Dr. Peter G. Tuteur, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed extensive medical evidence dating back to 1976 for his medical review (third supplement) dated November 6, 2000. (E-8). Dr. Tuteur noted that newly available medical data were "perfectly consistent" with those previous reviewed, but that Claimant's breathlessness had worsened. Dr. Tuteur concluded that his previous opinions as expressed in his reports of April 10 and October 13, 1998 remained unchanged. He opined that the Claimant was totally and permanently disabled to the extent that he was unable to perform his last coal mine employment. Dr. Tuteur attributed Claimant's disability to his low back syndrome and the symptoms of his primary pulmonary process. He explained that Claimant's primary pulmonary process was characterized by intermittent exacerbation of symptoms including breathlessness and exercise intolerance, and more recently, chronic non-productive cough. Dr. Tuteur opined that the etiology of Claimant's chronic bronchial reactivity was unclear, but might be related to a strong family history of allergy. He opined that Claimant's primary pulmonary process was unrelated to inhalation of coal mine dust or the development of coal workers' pneumoconiosis. Dr. Tuteur reiterated

that the Claimant did not have clinically significant, physiologically significant, or radiographically significant coal workers' pneumoconiosis or any other coal mine-dust induced disease process. He ruled out the presence of a coal dust induced respiratory or pulmonary impairment, stating that Claimant has an obstructive ventilatory defect that dramatically improved toward normal after bronchodilator administration, and was not associated either with a restrictive abnormality, or impairment of gas exchange. Dr. Tuteur opined that even if Claimant were found to have coal workers' pneumoconiosis via microscopic evaluation of the lung tissue, his pneumoconiosis would be insufficient in severity to produce symptoms, physical abnormalities, physiological impairment, or result in disability.

Dr. Tuteur reviewed Dr. Forehand's November 10, 2000 medical report in addition to his first medical review and second and third supplemental reviews for his fourth supplemental medical review dated December 8, 2000. (E-12). He opined that there was no convincing evidence indicating the presence of coal workers' pneumoconiosis. Dr. Tuteur reviewed possible etiologies for Claimant's airflow obstruction. He noted that Claimant reported being a non-smoker, despite elevated carboxyhemoglobin levels from 1995 through the present. He also noted Claimant's family history of allergy. Dr. Tuteur stressed Claimant's repetitive objectively documented improvement following bronchodilator administration, which was completely reversible early on, and had become only partially reversible with a remaining fixed component, which is consistent with asthma. Dr. Tuteur opined that Claimant's gastroesophageal reflux treated with Prilosec was an aggravating etiological factor, explaining that recurrent episodes of reflux with aspiration can mimic clinical nonspecific chronic bronchitis. Finally, Dr. Tuteur noted that coal dust inhalation does not produce a reversible disease when it produces coal workers' pneumoconiosis with associated fibrosis, or produces airflow obstruction even in the absence of classic simple coal workers' pneumoconiosis. Dr. Tuteur commented that Dr. Forehand's finding of a "steady decline in ventilatory function" was an expected function of age. He also explained that Claimant's back injury, which prevented him from returning to coal mine work, may have resulted in Claimant's perception of breathlessness and influenced his reduction of exercise tolerance. Dr. Tuteur opined that Claimant was totally and permanently disabled solely due to the consequences of his low back injury, a condition in no way related to, aggravated by, or caused by inhalation of coal mine dust or coal workers' pneumoconiosis. Dr. Tuteur stated that if the Claimant had never worked in the coal mine industry, his medical data regarding his pulmonary and ventilatory status would be no different.

Dr. J. Randolph Forehand, board-certified in pediatrics and allergy/immunology, examined the Claimant on November 10, 2000. (C-2). He recorded a coal mine employment history of sixteen years, last as a long wall jack setter, a nonexistent smoking history, medical, social and family histories, and current medications. Dr. Forehand's examination included a chest x-ray, EKG, and pulmonary function and arterial blood gas testing. He interpreted the chest x-ray as negative for pneumoconiosis. He interpreted the pulmonary function and arterial blood gas testing as indicative of a partially reversible obstructive ventilatory pattern with no evidence of arterial hypoxemia. He also noted that expiratory volumes and flows were reduced, there was evidence of hyperinflation and air trapping, and that inspiratory and expiratory flow volume curves were not indicative of upper airway obstruction. Dr. Forehand diagnosed chronic obstructive pulmonary disease, clinical evidence of coal workers' pneumoconiosis, and

"work limiting respiratory impairment of a mechanical nature."

In a letter to Claimant's counsel, dated November 11, 2000, Dr. Forehand responded to questions regarding the severity and nature of Claimant's respiratory impairment. (C-1). Dr. Forehand explained that the Claimant had a significant respiratory impairment, and that Claimant's ventilatory function had declined steadily since 1981. Dr. Forehand opined that Claimant's respiratory impairment would prevent him from returning to his last coal mining job and would be considered totally and permanently disabling. He opined that the Claimant's sixteen years of coal dust exposure led to sufficient small airways disease to block his airways without causing enough fibrosis to be seen on chest x-ray. Dr. Forehand stated that asthma is a reversible airways disease, and that between asthma attacks or in response to bronchodilator, the FEV_1 is normal. Dr. Forehand did not opine that the Claimant had asthma because Claimant never had a normal FEV_1, his FEV_1 did not become normal in response to bronchodilator, and in 1981and 1995, Claimant indicated that he did not have asthma or bronchial asthma. Dr. Forehand concluded that Claimant's respiratory impairment arose from the effects of "long-term coal dust exposure during his 16-year employment in underground coal mining."

Dr. Gregory J. Fino, board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed extensive medical evidence dating back to 1976, including his own past medical record reviews dated May 24, 1988, September 25, 1997, April 20, 1998, and April 27, 1998, for his report dated November 14, 2000. (E-10). Dr. Fino declared that his opinions as previously expressed remained unchanged, and that the Claimant had disabling asthma unrelated to coal mine dust inhalation. Dr. Fino stated that this is a "classic case of adult onset asthma." Dr. Fino also reviewed his past reports and Dr. Forehand's November 10, 2000 report for his supplemental report dated December 11, 2000. (E-12). The additional medical evidence did not cause him to change his original conclusions as noted in his previous reports.

Evidence Submitted with the Previous Claim–Reviewed Here for a Mistake in a Determination of Fact and Utilized Thereafter as a Basis for Comparison to Determine a Change in Conditions

Having reviewed the evidence contained in the evidentiary record before Judge Sutton in conjunction with his Decision and Order Denying Duplicate Claim for Benefits of August 25, 1999, this tribunal finds that Judge Sutton's decision provides a reliable inventory of the evidence submitted with the duplicate/subsequent claim and request for modification before him. Based on review of that evidence, this tribunal found no mistake in a determination of fact. Judge Sutton found that the Claimant established total disability, an element which previously defeated his application for benefits, and, therefore, established a material change in conditions as a matter of law (D-82 at 12).

The pulmonary function study evidence before Judge Sutton included eight studies administered between July 25, 1995 and September 22, 1998. All of the pre-bronchodilator results qualified for a finding of total disability; however, all but one of the post-bronchodilator results were non-qualifying. Only the study performed on April 18, 1998 yielded qualifying values both pre- and post-bronchodilator (D-75).

Six arterial blood gas studies were also administered between July 25, 1995 and April 18, 1998. Only the October 6, 1997 study produced qualifying results (D-75). There was no evidence in the record that the Claimant had been diagnosed with cor pulmonale with right sided congestive heart failure.

Of the physicians who provided reasoned medical opinions, Drs. Forehand, Dahhan, and Fino all opined that the Claimant's respiratory impairment rendered him totally disabled as defined in the Regulations. Dr. Michos opined that Claimant did not have a totally disabling respiratory impairment, but that it was not advisable that he return to coal mine employment due to the risk of aggravating his asthma. Dr. Tuteur opined that the Claimant was totally disabled by low back syndrome with an unspecified degree of pulmonary contribution. Judge Sutton, citing *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) and *Taylor v. Evans & Gamble Co.*, 12 BLR 1-83, 1-88 (1988), found that Dr. Michos's opinion was not equivalent to a finding of total disability. Citing *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236, 1-238 (1984), Judge Sutton found that Dr. Tuteur's opinion in regard to disability was too ambiguous and equivocal to constitute a credible opinion of total respiratory or pulmonary disability. Judge Sutton found that all physicians who examined the Claimant, Drs. Forehand, Dahhan and Fino, were in agreement that the Claimant was totally disabled by a respiratory impairment, and found that their opinions outweighed the contrary conclusion reached by Dr. Michos, who did not examine the Claimant, and were not contradicted by Dr. Tuteur's equivocal opinion.

Considering the other evidence of record under §718.204(c) (pre-amended), Judge Sutton found that the post-bronchodilator and arterial blood gas study results did not, in the absence of any medical explanation of how those results correlated with the exertional requirements of the Claimant's last job, constitute contrary evidence that was of greater probative weight than the reasoned medical opinions of Drs. Forehand, Dahhan, and Fino. Accordingly, Judge Sutton correctly found that the Claimant was totally disabled by a preponderance of the evidence under §718.204(c) (pre-amended). (D-82 at 5-12).

Having found that Claimant had established a material change in conditions, Judge Sutton considered whether all of the record evidence, including that submitted with the previous application, supported a finding of entitlement to benefits. The remaining element before Judge Sutton was whether pneumoconiosis was a contributing cause of Claimant's total disability. Judge Sutton reviewed and adopted Judge Feirtag's finding in the initial claim on remand, that Dr. Miller's opinion, as the only one finding the Claimant totally disabled due to pneumoconiosis, was discredited because Dr. Miller based his conclusions on an unreliable pulmonary function study and provided an unreasoned opinion that was outweighed by the other physicians' opinions, all of which attributed any respiratory or pulmonary impairment to causes unrelated to pneumoconiosis or coal mine dust exposure. (D-82 at 12-13).

Judge Sutton reviewed the newly-submitted evidence and also found that it did not establish that the Claimant's pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. Only Dr. Forehand opined that Claimant's pneumoconiosis contributed to his totally disabling respiratory impairment. Drs. Dahhan, Fino, Michos and Tuteur all concluded that the nature of Claimant's impairment, particularly the variability in pulmonary function study results and improvement with bronchodilator therapy,

was inconsistent with pneumoconiosis or any other coal dust induced impairment. They each opined that Claimant's impairment was most likely caused by asthma which had worsened in recent years. Judge Sutton accorded greater weight to the opinions of Drs. Dahhan, Fino, Michos, and Tuteur, based on their superior qualifications and detailed explanations reflecting careful analysis of the objective evidence. Judge Sutton found that Dr. Forehand provided a "minimal rationale," and found significant the fact that Dr. Forehand's most recent treatment notes made no mention of pneumoconiosis and reflected his impression that the Claimant 's respiratory impairment was due to asthma. (D-82 at 13). Accordingly, finding that the newly-submitted and previously-submitted evidence did not establish that Claimant's pneumoconiosis was a contributing cause of his total disability, Judge Sutton correctly found that Claimant failed to establish that element of entitlement by a preponderance of the evidence. Thus, no mistake in a determination of fact is apparent in Judge Sutton's conclusion that the evidence did not establish that Claimant's total disability was due to pneumoconiosis. The reasoned medical opinions established that the Claimant was totally disabled by an impairment with characteristics inconsistent with a coal dust induced lung disease, but consistent with asthma.

Change in Conditions

Total Disability Due to Coal Workers' Pneumoconiosis

Amended §718.204(c)(1) codifies the relevant case law, and requires the miner to establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §718.204(c)(1)(i) and (ii). A claimant cannot establish eligibility for benefits if he would have been totally disabled "to the same degree [and] by the same time in his life had he never been a miner." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 534 (4th Cir. 1998), quoting *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 (4th Cir. 1995).

The newly submitted evidence does not differ qualitatively from the evidence submitted in the previous application for benefits before Judge Sutton, and, accordingly, does not establish a change in conditions. Among the newly-submitted reports, only those of Drs. Forehand and Robinette attribute Claimant's totally disabling respiratory impairment to his pneumoconiosis. Drs. Dahhan, Fino, Tuteur and Michos continue to conclude that Claimant's impairment is unrelated to pneumoconiosis or any other condition caused or aggravated by coal mine dust exposure. Dr. McSharry, who was not involved in Claimant's earlier applications for benefits, also concluded that Claimant's impairment is unrelated to his former coal mine employment or pneumoconiosis. Instead, the substantial majority of the physicians opined that the nature of Claimant's respiratory impairment, significant for marked improvement with bronchodilator therapy and normal diffusion capacity, is not consistent with a condition caused or aggravated by coal mine dust exposure, but consistent with progressively worsening asthma.

The opinions of Drs. Robinette and Forehand are outweighed by the opinions of Drs. Dahhan, Fino, Tuteur, Michos, and McSharry. Dr. Robinette's opinion was based on a single examination of the Claimant and he provided no rationale for his conclusion that Claimant's condition, which he classified as irreversible despite noting that pulmonary function testing indicated a component of reversible airway dysfunction, was "at least partially related to his coal mining employment." (D-83). Dr. Forehand's opinion also failed to rise to the level of a reasoned medical opinion regarding the etiology of Claimant's disabling respiratory impairment, and was inconsistent with his October 8, 1998 diagnosis and treatment of the Claimant for "[d]ifficult to control asthma." (D-75). In his more recent reports, Dr. Forehand appears to have relied on Claimant's reported coal mine employment history of sixteen years in determining that Claimant's disabling respiratory impairment arose out of his coal mine employment history (C-1, 2). He ruled out asthma based on his findings that Claimant never had a normal FEV_1 and that Claimant stated that he did not have asthma in 1981 or 1995. Not only did Drs. McSharry and Dahhan, who are all qualified pulmonary specialists, which Dr. Forehand is not, refute Dr. Forehand's conclusion that asthmatics have normal FEV_1 when not having asthma attacks or after bronchodilator therapy, but Dr. Forehand's own treatment of the Claimant with accompanying diagnosis and prescription of several aerosol bronchodilators for asthma in 1998 contradicts his most recent opinion. Accordingly, Dr. Forehand's opinion does not support a finding that Claimant's respiratory disability is due to pneumoconiosis because it is not well-reasoned, it is directly refuted by other physicians of record, and it is inexplicably inconsistent with his prior diagnosis, assessment and treatment of the Claimant. *See Horton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); *see also Brazzale v. Director, OWCP*, 803 F.2d 934 (8th Cir. 1986).

Drs. Dahhan, Fino, Tuteur, Michos, and McSharry all provided well-reasoned and detailed opinions that the etiology of Claimant's respiratory impairment was inconsistent with pneumoconiosis or any other condition caused by, contributed to, or aggravated by coal mine dust inhalation. These physicians all reviewed extensive medical evidence spanning over twenty years of the Claimant's life and provided a careful analysis of the objective evidence in support of their opinions. Accordingly, because the overwhelming preponderance of the evidence establishes that Claimant's disabling respiratory impairment is unrelated to pneumoconiosis or coal mine dust inhalation, and instead strongly suggests an etiology of progressively worsening asthma, this tribunal finds and concludes that Claimant has not established that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment.

Conclusion

The new evidence is generally consistent with evidence previously submitted by the parties and considered by Judge Sutton, and is not indicative of a mistake in a determination of fact. The evidentiary record is consistent with Dr. Forehand's past treatment of the Claimant for asthma, despite his newfound contentions that Claimant suffers from nothing other than coal workers' pneumoconiosis. All physicians who reviewed Claimant's extensive medical evidence agree that Claimant's disabling respiratory impairment is entirely unrelated to his former coal mine employment. Claimant has failed to establish a change of

conditions, and review of the evidence of record and the conclusions based upon it disclose no mistake in a determination of fact. Consequently, Claimant has established no basis that would require or allow his requested modification, or an award of black lung benefits.

ORDER

Claimant Russell Daugherty's request for modification and claim for black lung benefits are denied.

A
EDWARD TERHUNE MILLER
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.